86-80 (6)

No. 86-80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEW YORK,

Petitioner,

—v.—

JOSEPH BURGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF THE RESPONDENT

GERARD E. LYNCH
Counsel of Record
435 West 116th Street
New York, New York 10027
(212) 280-8232

ALVIN J. BRONSTEIN
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800
Attorneys for *Amici Curiae*

RICHARD EMERY
New York Civil
Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

QUESTION PRESENTED

Is a state statute that purports to authorize warrantless searches, undertaken without probable cause or indeed any reasonable suspicion of criminal activity, to discover evidence of criminal violations rather than to secure compliance with a comprehensive regulatory scheme, consistent with the Fourth Amendment to the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and laws of the United States. The New York Civil Liberties Union is a state affiliate of the ACLU.

The ACLU has long worked to protect the rights of criminal defendants, and in particular the rights of all persons under the Fourth Amendment of the Constitution "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Toward that end, the ACLU has filed many briefs in this Court, as counsel for a litigant or as amicus curiae, in cases requiring the interpretation of the Fourth

Amendment or of other federal constitutional provisions related to criminal cases.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amicus curiae.

STATEMENT OF THE CASE

On November 17, 1982, five plainclothes New York City police officers entered Joseph Burger's business premises and announced that they were going to search his property. Mr. Burger's premises, used for his scrap metal business, were enclosed by a thirteen- or fourteen-foot-high, opaque metal fence, and separated by 200 feet of privately-owned property from the nearest public street. The officers proceeded to execute a thorough search of the premises, examining automobiles, automobile parts and other items found there, copying their identification or serial numbers, and determining whether such items had been reported stolen.

The only conceivable purpose for such a search, and indeed, its conceded purpose in

this instance, was to determine whether Mr. Burger was in possession of stolen property. Yet the officers possessed no warrant of any kind. Indeed, it is conceded that they had no information whatever (much less probable cause) suggesting that Mr. Burger was involved in criminal activity or that any evidence of crime would be found on his premises. The search, rather, was based entirely on a police department policy of conducting random searches of junkyards or "automobile dismantlers," to determine whether they possessed stolen property. This policy is purportedly authorized by two New York statutes.*

On June 27, 1984, Mr. Burger pled guilty to criminal possession of stolen property in

---

* The relevant statutes are set forth in Appendix A.

the second degree, N.Y.P.L. §165.45(3), after the denial of his properly-presented motion to suppress items seized during the warrantless "inspection" of his premises, and the Appellate Division of the Supreme Court of New York affirmed.

Leave to appeal to the Court of Appeals, the state's highest court, was granted, and on May 8, 1986, the Court of Appeals reversed the conviction. People v. Burger, 67 N.Y.2d 338. The Court held "that Vehicle and Traffic Law §415-a(5)(a), which authorizes warrantless inspections of vehicle dismantling businesses, and New York City Charter §46, which authorizes warrantless searches of junkyards and other businesses storing used, discarded or secondhand merchandise, violate the constitutional proscription against unreasonable searches and seizures." Id. at 340. The

Court rejected the State's argument that the statutes authorized valid "administrative inspections," finding that the statutes bore no relation to any administrative scheme, but merely purported to authorize warrantless searches of certain businesses that the legislature suspected occasionally harbored criminal activity:

> The fundamental defect in the statutes before us is that they authorize searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. The asserted "administrative schemes" here are, in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property.

Id. at 344.

This Court granted certiorari on October 6, 1986.

ARGUMENT

A STATE MAY NOT AUTHORIZE SEARCHES OF PRIVATE BUSINESS PREMISES, WITHOUT WARRANT OR PROBABLE CAUSE, TO UNCOVER EVIDENCE OF ORDINARY CRIMINAL VIOLATIONS.

Mr. Burger was subjected to precisely the sort of unconstitutional search and seizure that the Fourth Amendment was specifically intended to prohibit. A general search of enclosed property for the purpose of uncovering evidence of ordinary crimes is the very kind of intrusion that most concerned the framers of the Fourth Amendment. This Court has consistently held that such searches ordinarily may be conducted only if authorized by a warrant from a neutral magistrate, which in turn will issue only upon a showing of probable cause to believe that a crime has been committed, and that particularly-described evidence of that crime will be found at the particular place to be searched.

If the police themselves had evolved a policy of "routine" searches of private business premises, there could be no doubt of its unconstitutionality. The only difference between that very model of an unconstitutional search and the case at bar is that in this case the New York legislature has authorized the conduct at issue. It is of course well established that this is no difference at all; the legislature cannot authorize police officers to do what the Constitution forbids them to do. Sibron v. New York, 392 U.S. 40, 61 (1968).

New York's argument to the contrary in this case is based upon a fundamental misreading of this Court's precedents regarding "administrative searches." The State's argument attempts to turn carefully limited

doctrines delineating with the outer boundaries of the Fourth Amendment into a device to permit legislative evasion of its core prohibitions. A proper reading of the cases will not support such an argument.

A. Searches And Seizures Of Criminal Evidence Are Presumptively Invalid Unless Based On A Warrant Supported By Probable Cause.

The general proposition that a search and seizure is reasonable only if based on a warrant supported by probable cause is so well-established as hardly to require support. As this Court declared nearly 20 years ago, in all the vagaries of Fourth Amendment jurisprudence, "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized

by a valid search warrant." Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). See also Katz v. United States, 389 U.S. 347, 357 (1967). The text of the Fourth Amendment itself tells us, moreover, what is ordinarily required of such warrants: "[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Unless this case falls into one of the "carefully defined classes of cases" that constitute exceptions to these principles, the search and seizure that led to Mr. Burger's conviction must be found unconstitutional, because it violates each of these most fundamental commands:

(1) The search was conducted without a warrant, thus denying the opportunity for an

"informed and deliberate determination," United States v. Lefkowitz, 285 U.S. 452, 464 (1932), by a "neutral and detached magistrate," Johnson v. United States, 333 U.S. 10, 14 (1948), of the justification for intruding into protected privacy.

(2) The search was conducted without that probable cause that alone would justify a full search of private property, with or without a warrant. The officers conducting the search possessed no information whatever that could justify the conclusion that "there [was] a fair probability that contraband or evidence of a crime would be found" on Mr. Burger's premises. Illinois v. Gates, 462 U.S. 213, 238 (1983).

(3) Because the police lacked any basis for a belief that any particular item of contraband or evidence would be found, the search was necessarily a general search,

conducted without the constitutionally-required particularity as to the place to be searched or the things to be seized. See Marron v. United States, 275 U.S. 192 (1927). Far from having a warrant authorizing them to search for and seize any particular item, the officers lacked even a subjective, private notion of what they were looking for: the premises were searched simply to see if anything suspicious would turn up.

The search involved in this case was thus the paradigm of what the framers of the Fourth Amendment intended to prohibit: a general search of private property for evidence of unlawful behavior, unauthorized by judicial order, unjustified by probable cause, and unlimited by any specific objective. Mr. Burger's business was singled out for this general ransacking not by any evidence that

his premises harbored evidence of wrongdoing, nor even, as far as this record shows, by any systematic plan of routine inspections, but simply by the whim of someone in the police department. A closer analogy to the searches conducted under the colonial writs of assistance that were the particular target of the Fourth Amendment, see T. Taylor, Two Studies in Constitutional Interpretation (1969), can hardly be imagined.

Neither the business nature of Mr. Burger's premises nor the purported legislative authorization for the police conduct affects these fundamental principles. The constitutional protection against unreasonable searches and seizures is fully applicable to commercial premises, Donovan v. Dewey, 452 U.S. 594, 598 (1981); Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) and this Court

has repeatedly invalidated searches of business premises that violated Fourth Amendment norms. See, e.g., Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Nor can the legislature authorize conduct that would violate the Constitution if performed on the police officer's own "authority." A state "may not ... authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." Sibron v. New York, 392 U.S. at 61. See also Tennessee v. Garner, 105 S.Ct. 1694 (1985). The analogy to the writs of assistance emphasizes these points: the writs primarily affected business property, and were authorized by legislation. See Marshall v. Barlow's, Inc., 436 U.S. at

311-12; T. Taylor, Two Studies in Constitutional Interpretation, supra, at 35.

The starting point for analysis of this case, then, is clear. The search challenged by respondent was the very kind of random, unjustified general search for unspecified evidence of crime that the Fourth Amendment was intended to outlaw. Unless some exception to what are ordinarily regarded as the basic principles of the Fourth Amendment applies, the evidence it produced must be suppressed and the decision below affirmed.

B. The Search In This Case May Not Be Justified As An "Administrative Inspection."

Throughout this litigation, the State of New York has attempted to find an exception to these fundamental principles by relying on a line of cases, beginning with this Court's

1967 decisions in Camara v. Municipal Court, supra, and See v. City of Seattle, 387 U.S. 541 (1967), that deal with administrative and regulatory inspections of property designed to enforce compliance with various health and safety regulations. Although these cases do make clear that the unique necessities of certain regulatory schemes necessitate a somewhat different, and in some ways less rigorous, balancing of factors to determine the constitutional reasonableness of an intrusion into privacy, they clearly do not justify the search in this case.

First, and most fundamentally, the search here was not part of an administrative scheme to require health and safety standards, or to regulate the methods of operation of a particular business. Rather, it was a police search for evidence of possible criminal

violations. No case in the Camara line is comparable in this regard, and both the Court and various separate opinions have made quite clear that the "administrative inspection" rationale does not apply in such circumstances.

Second, even if the Camara line of cases did apply here, the search in this case does not satisfy even the standards applicable to "regulatory" searches. Contrary to the State's apparent belief, those cases do not establish an open-ended exception to ordinary Fourth Amendment principles. Though the decisions may appear to follow a wavering line, all of them insist on substantive safeguards and procedural regularity sufficient to make the administrative program "reasonable" -- safeguards entirely lacking under the New York statutes here.

1. The search of Mr. Burger's premises was not an "administrative inspection" within the meaning of this Court's cases.

a. This Court's prior cases have consistently distinguished administrative inspections from searches designed to enforce the criminal laws.

Every one of the cases in which this Court has tolerated searches of private premises on less than conventional probable cause under the rubric of "administrative inspections" has involved a limited inspection to insure compliance with an elaborate regulatory scheme affecting the public health or safety. In none has the Court accepted a claim that an ordinary police search for evidence of criminal violations entirely unrelated to any system of regulation could be justified by a state statute purporting to permit routine searches for such evidence, in the absence of either a warrant or probable

cause.

In Camara v. Municipal Court, supra, the first of this line of cases, this Court rejected warrantless searches of private premises by building inspectors to determine a building's compliance with municipal building or housing codes. The Court held, however, that a warrant could issue to permit such inspections even in the absence of probable cause to believe that a violation would be found in a particular building.*

In accepting this weakening of the ordinary probable cause standard, the Court expressly distinguished building inspections from searches conducted in the course of a

* In the companion case of See v. City of Seattle, 387 U.S. 541 (1967), the Court applied the same rule to commercial buildings that it had applied to residential property in Camara.

criminal investigation. Citing the specific example of searches for stolen goods, the Court emphasized that the

> public interest [in recovering stolen goods] would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

387 U.S. at 535.

Since the decision in Camara, this Court has faced numerous similar cases in which state or federal officials sought to engage in searches of private premises, pursuant to some sort of regulatory program, on less than a regular search warrant supported by probable cause. In some of these cases, the Court has required that at least the limited search

warrant specified in Camara be obtained.* In others, the Court has weakened constitutional protections still further, permitting limited administrative inspections without any prior neutral scrutiny at all.**

Whether or not an "administrative" warrant is required in these cases has often deeply divided the Court, and the distinctions between the cases in which warrants have and have not been held necessary are not always clear. But whatever division or confusion may exist about these cases should not obscure one fundamental feature that unites all of the

---

* In addition to Camara, see See v. City of Seattle, 387 U.S. 541 (1967); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Michigan v. Tyler, 436 U.S. 499 (1978); Michigan v. Clifford, 464 U.S. 287 (1984).

** See United States v. Biswell, 406 U.S. 311 (1972); Donovan v. Dewey, 452 U.S. 594 (1981). See also Colonnade Corp. v. United States, 397 U.S. 72 (1970).

cases in the Camara line: Each and every case in which the Court has approved a search of private property without the full range of safeguards normally demanded by the Fourth Amendment has involved limited inspections to determine and enforce compliance with particular regulations imposed under a comprehensive administrative scheme created to further pressing health and safety concerns. Where the principle objective of the search is to uncover evidence of criminal acts unrelated to such a regulatory scheme, this Court has never permitted any weakening whatever of the Fourth Amendment's requirements. Such searches may be conducted only pursuant to an ordinary search warrant, supported by probable cause.

Simply put, the "administrative search" rationale that has been held to permit

searches without particularized probable cause or, in some cases, even without a warrant, only applies to searches necessary to further genuine administrative regimes, and not to governmental attempts to enforce ordinary criminal laws by providing for routine, randomly-conducted searches for evidence of criminal violations in connection with an otherwise pro forma licensing requirement.

This critical distinction is not only implicit in the facts of the cases in which searches without probable-cause-based warrants have been permitted. It has been explicitly emphasized in both majority and dissenting opinions throughout the Camara line of cases. For example, in its most recent encounter with the administrative search doctrine, the Court rejected a claim that arson investigators should be permitted to make warrantless

searches to determine the origins or causes of fires. Michigan v. Clifford, 464 U.S. 287 (1984). The Court concluded that in the absence of exigent circumstances, a warrant of some sort was required. As to the nature of the warrant required, Justice Powell's plurality opinion sharply distinguished between administrative and criminal investigations:

> If a warrant is necessary, the object of the search determines the type of warrant required. If the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. To obtain such a warrant, fire officials need only show that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time.
>
> If the primary object of the search is to gather evidence of criminal activity, a search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in

> the place to be searched. ... A search to gather evidence of criminal activity not in plain view must be made pursuant to a criminal warrant upon a traditional showing of probable cause.

Id. at 294-95 (emphasis added; footnotes omitted).*

This recognition was hardly a novelty in Clifford. From the very outset of the administrative search line of cases, the Court distinguished the limited Fourth Amendment protection available in the administrative cases from the traditional requirement of a warrant supported by probable cause to authorize a search for evidence of crime. As

---

* See also Michigan v. Tyler, 436 U.S. 499, 511-12 (1978) (warrantless entry of firefighters to put out fire justified by exigency; additional entries to determine cause of fire require administrative warrants; but if evidence of crime is sought officials "may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime").

we have seen, Justice White's opinion for the Court in Camara emphasized that countenancing weakened warrants in administrative cases did not "endanger[] time-honored doctrines applicable to criminal investigations." 387 U.S. at 539. The dissenters, who would have permitted warrantless housing code inspections, similarly emphasized that the warrantless inspections they would permit "under the carefully circumscribed requirements of health and safety codes" were not "designed as a basis for criminal prosecution." See v. City of Seattle, 387 U.S. at 548-49 (Clark, J., dissenting).

The same distinction was made in Donovan v. Dewey, 452 U.S. 594 (1981). In Dewey, the Court permitted warrantless administrative searches to determine compliance with the regulatory regime of the Mine Safety Act.

Even as it held that warrantless administrative searches of commercial property are in some circumstances reasonable under the Fourth Amendment, however, the Court was careful to point out that an ordinary warrant supported by probable cause is required "when commercial property is searched for contraband or evidence of crime." Id. at 598 n. 6. Similarly, while joining in the Court's approval of the warrantless searches in Dewey, then-Justice Rehnquist was careful to emphasize that the same result could not be expected if a legislature sought to authorize warrantless "administrative" searches for criminal evidence:

> I have no doubt that had Congress enacted a criminal statute similar to that involved here -- authorizing, for example, unannounced warrantless searches of property reasonably thought to house unlawful drug activity -- the warrantless search would be struck down under our existing Fourth Amendment line of decisions. This Court would

> invalidate the search despite the fact that Congress has a strong interest in regulating and preventing drug-related crime and has in fact pervasively regulated such crime ... .

452 U.S. at 608.

b. The distinction between administrative and criminal searches is fundamental to a proper understanding of the Fourth Amendment.

The Court's powerful and continued insistence that the "administrative" search be confined to its proper sphere reflects a compelling insight about the purpose of the Fourth Amendment. The vital protection of a person's privacy in his home or property must of course yield to a sufficient showing that evidence of crime is to be found on particular premises. The Fourth Amendment provides for this compelling law enforcement necessity, but carefully specifies the standards and procedures by which a showing of necessity is

to be made: Except in exigent circumstances, a prior determination by a detached judicial officer of the existence of probable cause is required for a search to be reasonable. This procedure was specifically intended to strike the necessary balance between personal privacy and criminal law enforcement; it already incorporates, and thus is not superseded by, a proper appreciation of the necessities of law enforcement.

The administrative search cases do not affect this balance. The administrative schemes at issue in those cases do not propose new ways in which the police can search for evidence of crimes outside the balance struck by traditional Fourth Amendment jurisprudence. Searches of homes and businesses were not permitted in Camara and See to allow the police to enter premises to look for evidence

of narcotics use or burglary; gun dealers were not subjected to "administrative inspection" in Biswell so that the police could look for weapons that were used in crimes.

In each case, rather, the searches or inspections were geared to the particular needs of enforcing regulatory regimes necessitated not by the eternal problem of criminal law enforcement, but by the unique economic and social conditions of the modern state. Thus, fire, housing and occupational safety codes are required by modern urban and technological conditions, and regular inspections are necessary to enforce compliance with those codes; the distribution of dangerous substances like guns and liquor require regulation, and regular inspection to determine compliance follows.

These searches "represent responses to relatively unique circumstances." Marshall v. Barlow's, Inc., 436 U.S. at 313. In such circumstances, constitutional protections crafted for police searches are made less necessary by several factors, including (1) the lessened expectation of privacy resulting from participation in a pervasively regulated business; (2) the limited intrusion into privacy required by an inspection undertaken for a limited purpose; and (3) the presence of administrative structures that assure that inspections are made in a regular and fair manner, and not in a random or discriminatory fashion, thus lessening the need for an ordinary warrant. See Donovan v. Dewey, 452 U.S. at 599-600.

c. The New York statutes here authorize criminal, not administrative, searches.

In this case, however, the Court faces not an administrative inspection of this type, but precisely the kind of search for criminal evidence for which the ordinary Fourth Amendment rules were specifically created, and which Chief Justice Rehnquist in Dewey was so certain would be invalidated. For what New York has done is precisely to authorize "unannounced, warrantless searches" of a class of property its legislature reasonably believed would frequently "house unlawful ... activity" -- the possession of stolen property. The effort to disguise the statute in the trappings of an "administrative scheme" cannot affect this conclusion.

The New York Court of Appeals, which is

in a better position than this Court to interpret the meaning and purpose of New York statutes, correctly recognized that the New York statutes at issue in this case are intended to facilitate enforcement of criminal law and not to ensure compliance with any administrative regulation. As that court pointed out, far from being comprehensive regulatory schemes, "New York City Charter §436 and Vehicle and Traffic Law §415-a do little more than authorize general searches, including those conducted by the police, of certain commercial properties." 67 N.Y.2d at 344.

The New York Court was clearly correct in this conclusion. New York City Charter §436, as the court below pointed out, may be set aside at once: It imposes no licensing or regulatory requirements whatever on the

businesses subject to it, but merely announces a power in the police to subject those businesses to inspection at the whim of the authorities. Id. While Vehicle and Traffic Law §415-a "does contain some suggestion of an administrative scheme by imposing licensing and record-keeping requirements," id., these requirements hardly constitute a detailed scheme of regulation requiring the sort of search to which Mr. Burger's premises were subjected.

The "licensing" requirements referred to by the court are more a formality than a serious regulatory effort. Unlike other businesses requiring a license,* virtually no

---

* New York imposes specific licensing requirements on dozens of trades and businesses. The requirements for such licenses are generally far more detailed and specific than those established by §415-a for vehicle dismantlers. See, e.g., N.Y. Educ. L. §§7804-06 (masseurs); 3228 (newspaper carriers).

substantive qualifications are required of one who wishes to operate as a "vehicle dismantler." Anyone who wishes to set up such a business may do so upon payment of a $50 fee, provided only that the business complies with local zoning laws and its operator is determined by the Motor Vehicles Commissioner -- in accordance with no articulated standard -- to be a "fit person[]". N.Y. Vehicle and Traffic Law §415-a(3), (4). Indeed, the statute itself does not even speak of "licensing," with its connotations of standards and qualifications, aptly preferring the more ministerial term "registration." Id. §415-a.

The "regulatory scheme" imposed on those who have established such businesses is no more elaborate, and provides no greater justification for sweeping powers of

inspection, than the registration requirements. No limitation or regulation is made regarding the nature of a vehicle dismantler's premises, the method of its operation, the hours it may be open for business, or the functions it may perform. The sole operating requirement imposed by the statute is that a business subject to its requirements must keep a record of all motor vehicles or motor vehicle parts acquired, and the disposition of such parts. Id. §415-a(5)(a). It is these records, and the vehicles or parts that are the subject of such records, that the statute requires to be made available for inspection. Id.

The pallid quality of these regulations is important for several reasons. First, it refutes New York's contention that vehicle dismantling or junkyard operation is so

"pervasively regulated" as to diminish the reasonable expectation of privacy of anyone engaged in that business to the point that normal Fourth Amendment protections disappear. (P. Br. 13-18). Unlike such businesses as the sale of liquor, dealing in weapons, or mining, each of which is subject to extensive regulations and licensing requirements controlled by specialized administrative agencies, cf. Colonnade, Biswell and Dewey, the New York administrative scheme consists solely of the minimal registration and record-keeping requirements noted above.* The only aspect of this regulatory regime that significantly affects the privacy expectations of those engaged in this business is the challenged provision for warrantless searches

---

* The various statutes and regulations cited at footnote 4 of the State's brief add little or nothing to the basic scheme established by §415-a.

itself.* One has only to compare the minimalist regulatory framework of the instant statutory scheme to the pages and pages of statutes and regulations of the Mine Safety Act, see 30 U.S.C. §§801-962; 30 CFR §§1.1-100.8, or the extensive housing code at issue in Camara, to understand the weakness of New York's claim that vehicle dismantlers are "pervasively" regulated, or lack ordinary expectations of privacy because of the handful of record-keeping regulations imposed on them.

Second, the contrast between the limited nature of the regulatory scheme and the

---

* New York's suggestion that the New York Court of Appeals regarded the state's regulatory regime as "sufficiently pervasive to allow a scheme of warrantless inspections" (P.Br. 17) is hardly supported by the court's opinion. Far from characterizing the regulations as "pervasive," the court noted that the state statute and city charter "do little more than authorize general searches ... of certain commercial premises." 67 N.Y.2d at 344.

sweeping search undertaken in this case defeats any argument that the searches authorized by the statute are required in order to enforce the administrative scheme. The substantive regulations imposed by §415-a required Mr. Burger only to register and to maintain certain records. He conceded when the police arrived that he had not registered for a license and did not maintain any records. At that point, any further search could not be justified by a purported need to enforce the administrative scheme: A further search could reveal nothing more about Mr. Burger's failure to comply with the regulations. To the extent that §415-a authorized a search at that point, the search was obviously of a criminal rather than administrative nature. This Court would surely not have approved legislation that permitted the officers in Biswell, having

determined that the defendant was not in compliance with the gun control regulations, to search the rest of his property for evidence of further crimes unrelated to the regulated business. But that is precisely what the officers here did to Mr. Burger.* As evidenced all too well by this case, the search permitted by this statute is not a limited-purpose inspection of particular records, functions or inventory, but a total search of the entire premises and all items found there.

---

* New York argues that acceptance of this argument would permit a junk dealer to "thwart" the administrative scheme by failing to keep records. (P. Br. 31). But this argument depends on precisely the confusion of administrative and criminal ends that pervades the New York statute. A businessman who fails to register or keep records does not "thwart" the scheme. He violates it, and is subject both to administrative sanctions and to criminal penalties. Neither does he "thwart" the State's ability to gather evidence for a criminal prosecution. All that is thwarted is the State's desire to seek evidence of ordinary crimes without probable cause or a warrant.

Third, an elaborate administrative machinery evidences the genuineness of the need for regulation claimed to justify invasions of privacy on less than probable cause. For instance, the extensiveness of the congressional concern with mine safety is demonstrated by the comprehensive statute regulating the issue, and the detailed regulations that implement it; such regulation evinces a genuine determination to address a unique regulatory problem. The casualness of the regulatory program adopted by New York, and its enforcement by ordinary police officers, demonstrate in contrast the absence of a genuine concern for business regulation.

Indeed, the State's own characterization of its purposes concedes that the searches undertaken pursuant to the challenged statutes

do not serve any purpose connected to controlling the operation of junkyards, but rather are intended to enforce the generally-applicable criminal laws against possession of stolen property. (P. Br. 18). In stark contrast to the regulatory programs at issue in the Camara line of cases, the state has created no regulations specifically governing the proper operation of the affected business, and searches under the challenged statutes are not designed to determine compliance with any such business regulations. Rather, because of a perceived risk that some of those engaged in a particular business are violating general criminal statutes, the State required that everyone in that business demonstrate on demand of the police that they are not committing crimes, and that they surrender their constitutionally-protected expectations of privacy.

The effect of the New York statute is to reverse the usual constitutional presumption that personal privacy and property rights may not be violated in a criminal investigation until the state demonstrates evidence of criminal activity. Instead, the New York scheme singles out a class of businesses for a presumption that those engaged in it are predisposed to criminal activity, and are therefore required to open their property to random police inspections in order to prove their innocence.

To uphold the warrantless search here would create a potential for evasion of the Constitution not present in the Court's previous administrative search cases. States could destroy the Fourth Amendment protection of any class of business simply by finding a

propensity for certain criminal acts on the part of some proprietors of such businesses, requiring that such businesses obtain a pro forma license, and then authorizing regular "inspections" to make sure that no crimes were being committed. Tobacconists could be randomly raided for marijuana or other illegal drugs; booksellers' warehouses could be checked for pornography; news dealers or other small shopkeepers could be "inspected" for evidence of bookmaking -- all on the basis of "regulatory" schemes designed, like the one at issue here, simply to forestall criminal activity sometimes carried out under cover of those businesses.*

* The limits of the rationale suggested by the State are difficult to discern. Since the objects of "inspection" could be hidden anywhere on the premises, and since any evidence found in "plain view" during the search can be seized, the extent of the intrusion into privacy is not meaningfully limited by the purpose assigned by the legislature. Moreover, since the

In short, the "administrative" search purportedly authorized by the New York statute serves no valid regulatory purpose. Its conceded object, rather, is to facilitate police searches for stolen property and criminal prosecutions for its possession, by subjecting to warrantless searches classes of businesses believed by the legislature to have a propensity to involvement in such offenses. The New York statute is not an example of the administrative necessities that have led this Court to recognize a limited exception to the usual rules of search and seizure, but an effort to take advantage of that exception to cloak a statute that attempts to dispense with the Amendment's requirements. As the Chief

"administrative inspection" rationale is not limited to commercial premises, Camara v. Municipal Court, supra, it is not clear that homes too could not be subjected to such unlimited "regulatory" searches.

Justice predicted in Donovan v. Dewey, 452 U.S. at 608, there should be "no doubt" that such a statute should be held invalid under the Fourth Amendment.

2. Even if the search in this case were properly treated as an "administrative inspection," the Fourth Amendment requires at least that an administrative search warrant be obtained before an intrusion into private premises was made.

Even if the statutory searches of junk dealers and vehicle dismantlers could properly be characterized as administrative searches, that would neither end the inquiry nor compel the conclusion that the statute satisfies the Fourth Amendment. As this Court has repeatedly held, even administrative searches ordinarily require a warrant, although a warrant of a special, limited sort. Michigan v. Clifford, supra; Marshall v. Barlow's, Inc., supra; Camara v. Municipal Court, supra.

In searches undertaken under regulatory schemes, no less than in searches for evidence of crimes,

> the incremental protections afforded the [citizen's] privacy by a warrant ... justify the administrative burdens that may be entailed. The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.

Marshall v. Barlow's, Inc., 436 U.S. at 323-24.

These reasons apply with even greater

than usual force to this case. Particularly where an "administrative" search is conducted by ordinary police officers under a statutory scheme that is, to say the least, closely associated with ordinary law enforcement goals, there is a strong likelihood that searches will not be made "pursuant to an administrative plan containing specific neutral criteria," but will be undertaken instead as a pretext to evade the Fourth Amendment's warrant requirements in ordinary criminal investigations.*

Indeed, the only exception to the search warrant requirement has been in the case of "pervasively regulated business[es]," United States v. Biswell, 406 U.S. at 316, in which

* Indeed, as the court below pointed out, the New York courts have confronted exactly this problem. 67 N.Y.2d at 342-43. See People v. Pace, 101 A.D.2d 336 (2d Dep't 1984), aff'd, 65 N.Y.2d 684 (1985).

any entrepreneur "has voluntarily chosen to subject himself to a full arsenal of government regulation." Marshall v. Barlow's, Inc., 436 U.S. at 313. "The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." Id.

As demonstrated above, it cannot seriously be maintained that vehicle dismantling is such an industry. Rather than a "full arsenal of governmental regulation," New York has subjected this business only to a single rifle shot aimed directly at the Fourth Amendment.

Even where the regulatory presence is sufficiently longstanding and detailed to meet

this requirement, moreover, this Court's recent cases have insisted that a warrantless inspection may only be sustained where the regulatory regime provides a reasonable substitute for a warrant's protection of privacy, by establishing reasonable substantive standards for determining when searches will be undertaken and procedural mechanisms to challenge their validity.

Thus, in Donovan v. Dewey, supra, even after establishing that federal regulation of mining was indeed pervasive, and that the program of safety inspections was vital to enforcement of that regulatory scheme, the Court noted that the "real issue before us is whether the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." 452 U.S.

at 603.

The Mine Safety Act met both the substantive and procedural aspects of this requirement. The Act avoided administrative arbitrariness in selecting targets of searches by "requir[ing] inspection of all mines and specifically defin[ing] the frequency of inspection." Id. at 603-04. And the Act provided a mechanism for protection of privacy, by "prohibit[ing] forcible entries," and requiring a civil action to enjoin a mine owner who refused inspection. "This proceeding provides an adequate forum for the mineowner to show that a specific search is outside the federal regulatory authority, or to seek from the district court an order accommodating any unusual privacy interests that the mineowner might have." Id. at 604-05. In effect, the Act did require prior

judicial approval of any forcible entry, in a manner that provided greater protection than an ex parte warrant application.

The New York statutes, of course, are not remotely comparable to the Mine Safety Act in this regard. Neither the statutes nor any public regulations contain standards of any kind for the selection of targets of searches; so far as this record shows, searches are made entirely on the unbridled discretion of police officers that concerned this Court in Barlow's. And there is no mechanism for challenging the validity of a search in advance; as this case shows, the authorized response where permission to search is refused is search by the forcible compulsion of armed police officers: precisely the sort of "abrupt and peremptory confrontation between sovereign and citizen" that "the Fourth Amendment

neither requires nor sanctions." Michigan v. Tyler, 436 U.S. at 513-514 (Stevens, J., concurring in part and concurring in the judgment).

CONCLUSION

The searches purportedly authorized by the challenged New York statute, such as the one made in this case, are not administrative or regulatory searches at all. They are ordinary searches to obtain evidence of criminal violations, and as such, are subject to the Fourth Amendment's requirement of a warrant supported by probable cause. Even if viewed as administrative inspections, moreover, such searches require at least an administrative warrant demonstrating the reasonableness of the search according to neutral regulatory criteria. In either case, New York's own highest court correctly determined that the warrantless search in this case violated the Fourth Amendment, and its judgment should be affirmed.

Respectfully submitted,

GERARD E. LYNCH
Counsel of Record
435 West 116th Street
New York, New York 10027
(212) 280-8232

ALVIN J. BRONSTEIN
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

RICHARD EMERY
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Attorneys for Amicus Curiae

Counsel gratefully acknowledge the assistance of Eric B. Schnurer (application to bar pending) in the preparation of this brief.

January 21, 1987

APPENDIX A

Statutory Provisions Involved

New York Vehicle and Traffic Law § 415-a:

Vehicle dismantlers and other persons engaged in the transfer or disposal of junk and salvage vehicles

1. Definition and registration of vehicle dismantlers. A vehicle dismantler is any person who is engaged in the business of acquiring motor vehicles or trailers for the purpose of dismantling the same for parts or reselling such vehicles as scrap. No person shall engage in the business of or operate as a vehicle dismantler unless there shall have been issued to him a registration in accordance with the provisions of this

vehicle collector unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class A misdemeanor.

2. Application for registration. An application for registration as a vehicle dismantler, salvage pool, mobile car crusher or itinerant vehicle collector shall be made to the commissioner on a for prescribed by him which shall contain the name and address of the applicant and the names and addresses of all persons having a financial interest in the business. Such application shall contain a listing of all felony convictions and all other convictions relating to the illegal sale or possession of a motor vehicle or motor vehicle parts, and a listing of all arrests for any such violations by the applicant and

any other person required to be named in such application. The application shall also contain the business address of the applicant and may contain any other information required by the commissioner.

3. Fees. The annual fee for registration as a vehicle dismantler, salvage pool, mobile car crusher or itinerant vehicle collector shall be fifty dollars. Upon approval of an application, an appropriate registration shall be issued for a period of time determined by the commissioner and if issued for a period of more or less than one year, the fee shall be prorated on a monthly basis.

4. Requirements for registration. (a) Except as otherwise provided herein, no registration shall be issued or renewed unless the applicant has a permanent place of

business at which the activity requiring registration is performed which conforms to section one hundred thirty-six of the general municipal law as such section applies and to all local laws or ordinances and the applicant and all persons having a financial interest in the business have been determined by the commissioner to be fit persons to engage in such business. However, the commissioner may issue a temporary registration pending final investigation of an application.

(b) The provisions of this subdivision requiring a place of business at which the activity requiring registration is performed shall not apply to a mobile car crusher nor to an itinerant vehicle collector. However, the mobile car crusher or itinerant vehicle collector must otherwise comply with all applicable local licensing laws or ordinances.

(c) Notwithstanding the provisions of paragraph (a) of this subdivision, the commissioner may issue a registration to an applicant for registration as a vehicle dismantler or salvage pool to a person who may not comply with local laws relating to zoning provided that the applicant has engaged in business at that location as a vehicle dismantler since September first, nineteen hundred seventy-three. However, the issuance of such registration shall not be a defense with respect to any action brought with respect to violation of any such local law.

5. Records and identification. (a) Any records required by this section shall apply only to vehicles or parts of vehicles for which a certificate of title has been issued by the commissioner or which would be eligible

to have such a certificate of title issued. Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. The commissioner may, by regulation, exempt vehicles or major component parts of vehicles from all or a portion of the record keeping requirements based upon the age of the vehicle if he deems that such record keeping requirements would serve no substantial value. Upon request of an agent of the commissioner or of any police officer

and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. Upon request of any agent of the commissioner and during his regular and usual business hours, a salvage pool, mobile car crusher or itinerant vehicle collector shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as

required by this paragraph shall be a class A misdemeanor.

(b) Every vehicle dismantler and salvage pool shall display at his place of business at least one sign upon which his registration number and any other information required by the commissioner is affixed in a manner prescribed by the commissioner and further shall affix his registration number on all advertising, business cards, and vehicles used by him in connection with his business. The commissioner is hereby empowered to require, by regulation, that vehicle dismantlers and salvage pools mark, stamp or tag major component parts of vehicles in their possession in a manner prescribed by the commissioner so as to enable the part so marked to be identified as having come from a particular vehicle and from a particular

vehicle dismantler and salvage pool. A violation of this paragraph shall be a class A misdemeanor.

6. Suspension, revocation and refusal to renew a registration; civil penalty. (a) A registration may be suspended or revoked, or renewal of a registration refused upon a conviction of any provision of the penal law relating to motor vehicle theft, illegal possession of a stolen vehicle or illegal possession of stolen motor vehicle parts, or after the registrant has had an opportunity to be heard upon any change of status of the registrant which would have resulted in refusal to issue a registration, any false statement in an application for a registration, any violation of subdivision five of this section or regulations promulgated by the commissioner with respect

to this section, or any violation of title ten of this chapter.

(b) Civil penalty. The commissioner, or any person deputized by him, in addition to or in lieu of revoking or suspending the registration of a registrant in accordance with the provisions of this article, may in any one proceeding by order require the registrant to pay to the people of this state a civil penalty in a sum not exceeding one thousand dollars for each violation and upon the failure of such registrant to pay such penalty within twenty days after the mailing of such order, postage prepaid, registered or certified, and addressed to the last known place of business of such registrant, unless such order is stayed by an order of a court of competent jurisdiction, the commissioner may revoke the registration of such registrant or

may suspend the same for such period as he may determine. Civil penalties assessed under this subdivision shall be paid to the commissioner for deposit into the state treasury, and unpaid civil penalties may be recovered by the commissioner in a civil action in the name of the commissioner.

(c) In addition, as an alternative to such civil action and provided that no proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the commissioner may file with the county clerk of the county in which the registrant is located a final order of the commissioner containing the amount of the penalty assessed. The filing of such final order shall have the full force and effect of a judgment duly docketed in the office of such clerk and may be enforced in the same manner

and with the same effect as that provided by law in respect to executions issued against property upon judgments of a court of record.

7. Registration as a dealer and as a vehicle dismantler or salvage pool. A person may be registered as a dealer under section four hundred fifteen of this chapter as well as a vehicle dismantler or a salvage pool under this section. However, any such person must obtain a separate registration for each activity and must maintain separate records for each activity.

8. Vehicle rebuilders. (a) A vehicle rebuilder is any person engaged in the business of acquiring damaged vehicles for the purpose of repairing and reselling such vehicles. In order to engage in such business, a person must be registered as a

vehicle dismantler pursuant to this section or as a dealer pursuant to section four hundred fifteen of this chapter.

(b) A vehicle rebuilder shall maintain a record of all vehicles or major component parts thereof coming into his possession for the purpose of rebuilding and all major component parts used in connection with such rebuilding in a manner prescribed by the commissioner. Upon request of an agent of the commissioner or any police officer during his regular and usual business hours, a vehicle rebuilder shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. The failure to produce such records or to permit such records or to permit

such inspection as required by this paragraph shall be a class A misdemeanor.

9. Scrap processor. (a) A scrap processor is any person required to be licensed under article six-C of the general business law who purchases material which is or may have been a vehicle or vehicle part for processing into a form other than a vehicle or vehicle part, but who, except as otherwise provided by regulation of the commissioner, does not sell any such material as a motor vehicle, a trailer or a major component part thereof. No person shall engage in business or operate as a scrap processor as defined in this paragraph unless he has given notice to the commissioner that he is a scrap processor and that he has complied with article six-C of the general business law, and he has been certified by the commissioner as a scrap processor. A

violation of this paragraph shall be a class A misdemeanor.

(b) A scrap processor shall maintain a record of vehicles and a major component parts by weight coming into his possession thereof in a manner prescribed by the commissioner. This paragraph shall not apply to any major component part included in a mixed load. Upon request of an agent of the commissioner or any police officer or during his regular and usual business hours, a scrap processor shall produce such records and permit such agent or police officer to inspect them and to inspect any vehicles or major component parts of vehicles at the time of the delivery of such vehicles or parts to him. The failure to produce such records or to permit such inspection as required by this paragraph shall be a class A misdemeanor.

10. Scrap collectors and repair shops. (a) A scrap collector is any person, other than a governmental agency, whose primary business is the collection of miscellaneous scrap for disposal, who may as an incident of such business collect vehicular parts as scrap. No person shall engage in the business or operate as a scrap collector as defined in this paragraph unless he has given notice to the commissioner that he is a scrap collector and has been certified as a scrap collector by the commissioner. A violation of this provision shall be a class A misdemeanor. No person shall be certified as a scrap collector eligible to do business within a city having a population of one million or more, or any county contiguous to such city, unless such person complies with all local requirements applicable to such business.

(b) If required by regulation of the commissioner, a scrap collector shall keep records of his acquisition and disposition of vehicular scrap in a manner prescribed by the commissioner. Upon request of an agent of the commissioner or any police officer, a scrap collector shall produce such records as may be required to be kept and permit said agent or police officer to inspect them during usual business hours or while business is being conducted. The failure to produce such records as required by this paragraph shall be a class A misdemeanor.

(c) A repair shop registered pursuant to article twelve-A of this chapter which disposes of vehicular scrap to a certified scrap processor shall apply to the commissioner for certification to carry out

this disposal. The repair shop shall include in the application for certification the names and addresses of those scrap processors with whom it arranges for the disposal of its scrap. Thereafter the repair shop shall give notice to the commissioner within thirty days of any change in the scrap processors with whom it deals. The failure to comply with this paragraph or to make fraudulent statements regarding the scrap processors with which a repair shop arranges for the disposal of vehicular scrap shall be a class A misdemeanor.

11. Out-of-state businesses. A person doing business in this state who does not have a place of business in this state, but has a place of business or engages in such business in another state or province or Canada and who would be required to be registered or

certified pursuant to this section if it were in this state, shall apply to the commissioner for an identification number in a manner prescribed by the commissioner. Such identification number shall be issued provided that such person complies with all the laws and regulations of the jurisdiction in which he has his principal place of business or engages in such business applicable to such business.

12. Identification of certified persons. (a) Every person who is certified or who has been issued an identification number by the commissioner shall display such certification or identification number upon any vehicle used by him for the business of transporting vehicles or parts of vehicles, in accordance with regulations prescribed by the commissioner.

(b) It shall be a class A misdemeanor for any person required to be registered or certified pursuant to the provisions of this section to transport a vehicle or major component parts out of New York state without having and displaying his registration or certification number as provided for in this section.

13. Suspension or revocation of identification number or certification. An identification number and/or certification issued pursuant to subdivision eight, nine, ten or eleven of this section may be suspended or revoked upon conviction of any provision of the penal law relating to motor vehicle theft, illegal possession of a stolen vehicle or illegal possession of stolen motor vehicle parts. The commissioner may also revoke or

suspend registration or certification, after an appropriate hearing where the holder of the registration or certification has had an opportunity to be heard, upon a finding of: (a) that there has been a change to the holder's status which would have resulted in refusal to issue in the first instance, or (b) that the issuance was based upon a false statement by the holder, or (c) that there was a violation of the record keeping requirements, or (d) that there was a violation of the regulations promulgated by the commissioner pursuant to this section, or (e) that there was a violation of title X of this chapter.

14. Restrictions on scrap processors. A certified scrap processor shall not purchase any material which may have been a vehicle or a major component part of a vehicle, if

recognizable as such, from any person other than a dealer registered pursuant to section four hundred fifteen of this chapter, an insurance company, a governmental agency, a person in whose name a certificate of title or other ownership document has been issued for such vehicle or a person registered or certified or issued an identification number pursuant to this section. A violation of this subdivision shall be a class A misdemeanor.

15. Regulations. The commissioner shall prescribe such rules and regulations as he shall deem necessary to carry out the provisions of this section.

New York City Charter § 436:

The commissioner shall possess powers of general supervision and inspection over all

licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise or auctioneer, or any clerk or employee of any thereof shall be triable by the judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both.